

Program Research Project

TRYING TO WIN THE LEGAL BATTLE BUT LOSING THE STRATEGIC WAR: U.S. EFFORTS TO THWART THE INTERNATIONAL CRIMINAL COURT

BY

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USAWC PROGRAM RESEARCH PAPER

**TRYING TO WIN THE LEGAL BATTLE BUT LOSING THE STRATEGIC WAR: U.S.
EFFORTS TO THWART THE INTERNATIONAL CRIMINAL COURT**

by

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ABSTRACT

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The International Criminal Court ("ICC") is widely regarded within the international community as a positive and necessary step toward individual accountability for those who order and carry out the most heinous of crimes—genocide, crimes against humanity, and war crimes. The United States government views the ICC as an international institution that threatens U.S. sovereignty and has the potential to be a forum in which its servicemembers and government officials may fall victim to malicious, politically motivated prosecutions. Congress and the Bush administration instituted measures to minimize the possibility of American citizens falling under ICC jurisdiction. These measures accomplished little in terms of true protection of U.S. citizens from ICC prosecution; they did, however, adversely impact U.S. strategic interests. This paper will examine the ICC's authority, U.S. objections to ICC authority, U.S. actions to prevent the ICC from obtaining jurisdiction over American citizens and the adverse impact these actions had on its strategic interests, and offer a less contentious approach for dealing with both the ICC and other nations that support the Court.

TRYING TO WIN THE LEGAL BATTLE BUT LOSING THE STRATEGIC WAR: U.S. EFFORTS TO THWART THE INTERNATIONAL CRIMINAL COURT

The creation of the International Criminal Court (“ICC”) is seen by most of the world’s nations and by many human rights organizations as a positive and necessary step toward ending the impunity often enjoyed by those who order and carry out the most heinous of crimes—genocide, crimes against humanity, and war crimes.¹ Though long a champion of achieving this goal and supporter of an international court dedicated to prosecuting such crimes,² the United States government views the ICC as an international institution that threatens U.S. sovereignty and as a potential vehicle by which its servicemembers, elected officials, and policy makers may fall victim to malicious, politically motivated prosecutions.

Legislative and executive branch responses to the ICC have been swift, unambiguous, and designed to insulate Americans from the ICC’s jurisdiction. These efforts, however, potentially compromise the United States’ standing as a world leader in furthering the rule of law, jeopardized the nation’s ability to fully respond to national security threats, and undermined the United States’ ability to fully implement its National Security Strategy.

This paper will highlight several key provisions of the Rome Statute of the International Criminal Court (“Rome Statute” or “Statute”) that gave rise to U.S. concern over and rejection of the ICC.³ This paper will then examine U.S. governmental reaction to the Court’s creation as well as measures taken by Congress and President George W. Bush’s administration to limit the Court’s jurisdictional reach over U.S. citizens. This paper will next discuss how U.S. congressional and administration

actions from 2002 to 2004 contradicted important elements of the 2002 U.S. National Security Strategy and have adversely affected U.S. strategic interests. Finally, this paper will note recent shifts in congressional and Bush administration approaches to dealing with the specter of ICC jurisdiction over Americans. This paper will argue that these changes should go further by repealing current legislation and allowing for withdrawal from bilateral agreements that attempt to protect U.S. citizens, servicemembers, and officials from ICC jurisdiction and advocate a less contentious approach for dealing with both the ICC and other nations that support the Court.

The ICC

The ICC is the manifestation of the international community's resolve to address the impunity individuals in significant leadership positions have availed themselves of in carrying out acts of genocide, war crimes, and crimes against humanity.⁴ The first step toward the Court's creation was a vote taken in Rome, Italy on 17 July 1998 by representatives attending the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court.⁵ This vote, taken to adopt the Rome Statute establishing the ICC, tallied 120 participating states favoring adoption of the Rome Statute, twenty-one states abstaining, and seven states voting against the Statute.⁶ The United States was one of the seven states to vote against the Statute.⁷

Under the terms of the Statute, 31 December 2000 was established as the final date by which a state could sign the Statute and become a provisional party pending final ratification, acceptance, or approval of the Statute according to the state's domestic

laws.⁸ The Rome Statute would not enter into force, and the ICC would not be formally established, until the first day of the month after the 60th day following the date of the deposit of the 60th ratification of the Statute with the Secretary-General of the United Nations.⁹

Parts 1 and 2 of the Rome Statute¹⁰ set forth the guiding principles of the Court, the crimes it is authorized to investigate and prosecute, and the jurisdiction of the Court. Article 1 of the Statute articulates three important principles. The first is that the Court shall be a permanent institution.¹¹ The second principal is that the Court shall exercise its jurisdiction only over a limited number of offenses considered to be the most serious crimes of international concern. The final principal is that the Court's jurisdiction shall be complementary to national criminal jurisdictions.¹²

Article 5 of the Statute sets forth the four crimes that are within the Court's jurisdiction to investigate and prosecute; they are genocide, crimes against humanity, war crimes, and the crime of aggression.¹³ These four crimes represent the most serious crimes of international concern referenced in Article 1.¹⁴

Articles 12 and 13 of the Statute outline how the Court may exercise its jurisdiction. Under Article 13, the Court may undertake an investigation or prosecution in one of three ways. First, it can have a matter referred to it by a state that has ratified the Statute ("State Party"). Second, it can have a matter referred to it by the U.N. Security Counsel acting under Chapter VII of its Charter. Finally, the Chief Prosecutor may, on his or her own initiative, initiate an investigation.¹⁵ If a matter is referred to the

Court by a State Party or an investigation is initiated by the Chief Prosecutor, Article 12 stipulates that the Court will have jurisdiction over the matter only if the alleged crime was committed on the territory of a State Party or the person accused of the crime is a citizen of a State Party.¹⁶

These two articles define important aspects of the ICC's power. Under Article 12, the Court may exercise jurisdiction over the citizen of a non-State Party if that person is alleged to have committed one of the covered crimes on the territory of a State Party. Additionally, even if a State Party does not refer the matter to the ICC for investigation and prosecution, the Chief Prosecutor is empowered under Article 13 to invoke the Court's jurisdiction and on his or her own initiative conduct an investigation of a non-State Party citizen's actions.¹⁷

While Articles 12 and 13 address whether the Court has jurisdiction to conduct investigations and prosecutions, Article 17 addresses instances in which the Court will forego exercising its jurisdiction. Under Article 17, the Court will consider a case "inadmissible," meaning it will not exercise its jurisdiction, when the case is being investigated or prosecuted by a state which has jurisdiction over it, the case has already been investigated by a state having jurisdiction over it and the state decided not to prosecute, or the person concerned has already been tried for the conduct which is the subject of the complaint regardless of the trial's outcome.¹⁸ This deference to national investigative and judicial action is referred to as "complementarity;"¹⁹ it is the principal articulated in Article 1 whereby the ICC will act as a court that compliments already established national judicial systems.²⁰

U.S. Government Concerns Regarding the ICC

Despite significant concerns over the operation and jurisdictional reach of the ICC, President William J. Clinton directed that the United States sign the Rome Statute on 31 December 2000.²¹ In his statement regarding the Statute, President Clinton made clear that the United States believed the Statute contained “significant flaws” but that it would sign the Statute because “with signature, . . . we will be in a position to influence the evolution of the Court. Without signature, we will not.”²² President Clinton’s statement made equally clear his opinion that the U.S. Senate should not ratify the Statute, as then written.²³

The Clinton administration had several concerns about the operation of the ICC.²⁴ Three stood out from the rest and served as the foundation for subsequent actions by President George W. Bush’s administration and by Congress. The first concern was essentially a legal objection to the fact that the Statute, under Article 12, asserted jurisdiction over citizens of states that were not parties to the Rome Statute.²⁵ The U.S. position was that while Article 12 may not create obligations per se for non-State Parties, the practical effect of the ICC jurisdiction would be to abrogate the pre-existing rights of non-State Parties which, in turn, would violate international law.²⁶

The second concern also flowed from Article 12’s jurisdictional reach but the focus was on how the ICC’s jurisdiction might adversely affect U.S. foreign policy decisions. Under the Statute, government officials and senior ranking military officers can be tried for alleged violations of crimes covered by the Statute.²⁷ Although the ICC’s stated intent is to investigate and prosecute individuals, not states, for violations

of crimes, the U.S. contended that subjecting non-State Party government officials to possible prosecution for acts undertaken in an official capacity and in furtherance of national policy was actually a de facto prosecution of the state. To assert jurisdiction over a non-State Party, albeit indirectly through the prosecution of a government official who acted to further official state foreign policy, would be a violation of the state's sovereignty.²⁸

The third concern arose from Article 15's provision permitting the Chief Prosecutor to instigate investigations on his or her own initiative.²⁹ The U.S. believed this vested too much authority in the Prosecutor without adequate checks or safeguards. The fear was that a Prosecutor with such wide discretion unchecked by the United Nations Security Council or some other body might instigate frivolous or politically motivated investigations and prosecutions.³⁰

Fighting the Legal Battle—U.S. Responses to the ICC

11 April 2002 marked an important day in the ICC's history. On that date, the 60th instrument of ratification of the Rome Statute was deposited with the United Nations.³¹ As a result, the criterion to bring the ICC into force was met and, on 1 July 2002, the International Criminal Court officially came into being.³²

The U.S. responded quickly to this development. On 6 May 2002 the Bush administration notified the United Nations that it did not intend to ratify the Rome Statute despite its signature of the Statute on 31 December 2000.³³ In a letter sent to U.N. Secretary General Kofi Annan, then-Under Secretary of State for Arms Control and International Security John Bolton officially set forth the Bush Administration's position

stating “the United States does not intend to become a party to the [Rome Statute]. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”³⁴

Following this declaration, the Bush administration undertook two other measures to minimize the chance that U.S. military personnel and government officials might be subject to ICC jurisdiction. The first was to seek U.N. Security Council immunity for U.S. military personnel participating in U.N. peacekeeping missions. To overcome initial resistance by Security Council members, the U.S. threatened to not renew two peacekeeping mandates for Bosnia and Croatia.³⁵ In response, the Security Council passed a compromise resolution on 12 July 2002 which did not provide blanket immunity for U.S. personnel but did request the ICC not take action for one year on any case referrals involving personnel from a non-ICC State Party engaged in a U.N. authorized operation.³⁶

The second measure was a campaign to enter into bilateral agreements with other nations aimed at preventing the surrender of U.S. personnel³⁷ to the ICC. The basis for these agreements is found in Article 98 of the Rome Statute which prohibits the Court from requesting a nation to surrender an individual to the Court if it would require the requested state to violate an international agreement it has with a third state.³⁸ By enacting such agreements,³⁹ commonly referred to as “Article 98 agreements” or “Bilateral Immunity Agreements,”⁴⁰ the U.S. hoped to ensure that its personnel operating in an ICC member nation would not be surrendered to the ICC if indicted by the Court.⁴¹

U.S. reaction to the Rome Statute coming into force was not limited to the executive branch. Congress also demonstrated its disapproval of the Court during its crafting of the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States. Prior to finalizing the supplemental appropriations bill, Congress approved an amendment entitled The American Servicemembers' Protection Act ("ASPA" or "Act").⁴² President Bush signed the supplemental appropriations bill, including the ASPA, on 2 August 2002.⁴³

The ASPA, as enacted, placed significant constraints upon U.S. cooperation with the ICC.⁴⁴ The ASPA prohibited U.S. federal courts and agencies as well as state and local courts and governments from responding to a request for cooperation from the ICC.⁴⁵ The ASPA also prohibited the direct or indirect transfer of classified national security information and law enforcement information to the ICC.⁴⁶

These prohibitions, however, were subject to two provisions in the Act that provided some avenues for cooperation with the Court. First, these specific prohibitions did not apply to any action with respect to a specific matter involving the ICC taken or directed by the President on a case-by-case basis in the exercise of his authority as Commander in Chief or in the exercise of the executive power under Article II, Section 1 of the Constitution.⁴⁷ Second, the ASPA stated that none of the prohibitions contained in the Act "shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."⁴⁸

In a section specifically addressing fears that U.S. servicemembers may be subject to ICC jurisdiction, the ASPA restricted U.S. participation in U.N. peacekeeping operations. Under the Act, U.S. servicemembers were precluded from participating in any peacekeeping operation unless the President certified to Congress that U.S. servicemembers would be excluded from ICC jurisdiction or that it was in the national interest of the U.S. to participate.⁴⁹

The ASPA also restricted certain types of military assistance to State Parties to the Rome Statute. Under the Act, “no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.”⁵⁰ This prohibition, however, was subject to several waivers and exemptions: (1) the President may waive the prohibition with respect to a particular country if he determines that it is important to the national interest of the United States; (2) the President may also waive the prohibition with respect to a particular country if that country has entered into an Article 98 agreement; and, (3) NATO member countries, major non-NATO allies,⁵¹ and Taiwan are specifically exempt from the prohibition.⁵² Though not readily distinguishable from the Act’s definition of “military assistance,”⁵³ the types of military assistance prohibited by the ASPA are primarily International Military Education and Training (“IMET”) and Foreign Military Financing (“FMF”) assistance.⁵⁴

Congress enacted further aid restrictions in 2004 for countries that had ratified the Rome Statute. In drafting the Fiscal Year 2005 Consolidated Appropriations Act,

Congress adopted an amendment proposed by Representative George Nethercutt, Jr. President Bush signed the Fiscal Year 2005 Consolidated Appropriations Act, including what became known as the “Nethercutt Amendment,” on 8 December 2004.⁵⁵

The Nethercutt Amendment prohibited providing Economic Support Funds (“ESF”) to any ICC State Party that had not entered into an Article 98 agreement with the U.S. Similar to the ASPA, the Nethercutt Amendment allowed the President to waive the prohibition with respect to any NATO member country, major non-NATO ally, or Taiwan if it was deemed important to the national security interests of the United States. The President could also waive the prohibition with respect to a particular nation if that nation had entered into an Article 98 agreement with the U.S.⁵⁶ Congress renewed this restriction in passing the Fiscal Year 2006 Consolidated Appropriations Act which was signed by President Bush on 14 November 2005.⁵⁷

Losing the Strategic War—Undermining U.S. Strategic Interests

Congressional and executive branch responses to the Rome Statute coming into force came at a critical time of U.S. strategic interest definition. The decisive 60th ratification of the Statute occurred in April 2002—seven months after the terrorist attacks of 11 September 2001, roughly six months after the beginning of U.S. war efforts in Afghanistan, and approximately eleven months before U.S. ground forces entered Iraq. The official pronouncement of the U.S. strategy for achieving its strategic interests at this turbulent time was made in September 2002 with the Bush Administration’s release of the National Security Strategy (“NSS”).⁵⁸

The 2002 NSS was understandably focused on keeping America safe from terrorist threats. Most of the security strategy objectives were described, in part, as a

means to address terrorism and one objective in particular was linked specifically to the terrorist threat.⁵⁹ The NSS did, however, articulate strategy objectives that transcended the fight against terrorism. For example, in describing the U.S. objective of championing aspirations for human dignity the NSS stated, "In pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere."⁶⁰ The NSS also stressed in various sections the need to work with other nations to strengthen stability at the regional level. In elaborating on the security strategy objective of working with others to defuse regional conflicts, the NSS identified the Western Hemisphere and Latin America as regional areas where cooperation with other nations was necessary to advance security and prosperity as well as fight terrorism and drug trafficking.⁶¹

Despite these stated strategic objectives, each U.S. effort to insulate its citizens from the ICC gave rise to increasingly negative strategic consequences. The Bush administration's threat to not renew U.N. peacekeeping mandates for Bosnia and Croatia was a significant card to play in an attempt to secure what, at best, would have amounted to only limited immunity from ICC prosecution.⁶² In the end, the U.S. obtained nothing more than a watered-down commitment from the U.N. Security Counsel that fell short of immunity for U.S. peacekeeping forces.⁶³ To the Bush Administration, this might have appeared to be a good, though not great, result. To the international community, particularly the European Union, the U.S. measure was unnecessary and excessive.⁶⁴ The message taken away by the international

community was that the U.S. was prepared to jeopardize and perhaps abandon important international stabilization efforts in order to minimize (even to a very small degree) possible ICC jurisdiction over its citizens.⁶⁵

International resentment of U.S. actions grew as the Bush administration pushed efforts to negotiate bilateral Article 98 agreements and officially ratified the ASPA and Nethercutt Amendment.⁶⁶ In response to U.S. efforts to ratify Article 98 agreements, the Council of the European Union issued a set of guiding principles on 30 September 2002 for its member states to use in deciding whether to enter into such bilateral agreements.⁶⁷ Specifically addressing the proposed U.S. agreements, the Council offered a diplomatically worded rebuke stating, “Entering into US agreements—as presently drafted—would be inconsistent with ICC States Parties’ obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties.”⁶⁸ The Council was more direct two years later in its response to the passage of the Nethercutt Amendment:

The European Union deeply regrets that the US omnibus Appropriations Bill 2005, adopted by the US Senate on December 7, included the so-called Nethercutt Amendment. . . . The EU reiterates that any bilateral non-surrender agreement that were to be concluded should, by respecting the legal obligations of sovereign nations party to the Rome Statute, preserve the integrity of the Rome Statute.⁶⁹

While Europe bristled at U.S. threats to cut aid to countries that had not signed an Article 98 agreement, the actual impact on European nations was minimal, primarily because most were NATO nations and, therefore, exempt from ASPA and Nethercutt Amendment sanctions.⁷⁰ This was not the case, however, for African and South American nations. Seven African nations saw their entire IMET and FMF funds cut in

fiscal years 2004 and 2005. This amounted to a total loss in military assistance of \$9.23 million in fiscal year 2004 and \$825,000 in fiscal year 2005.⁷¹ Additionally, Kenya forfeited \$7.51 million in IMET and FMF funds in fiscal year 2005.⁷² The ramifications were significant for U.S. interests in two respects; first, it hampered U.S. efforts to combat terrorism in Africa,⁷³ and second, it offered China an opportunity to increase its presence and influence in Africa to fill the void left by U.S. withholding of aid.⁷⁴

A similar situation was seen in Latin America and the Caribbean. Eight nations lost all of their IMET and FMF funds in fiscal year 2004 for a total loss of \$22.15 million; the number grew to nine nations in fiscal year 2005 for a total loss of \$8.5 million.⁷⁵ Additionally, four nations lost ESF funds in fiscal year 2005 totaling \$5.955 million.⁷⁶

The effects these cuts had on U.S. interests in Latin America and the Caribbean were highlighted to Congress in testimony from regional analysts and the Commander, United States Southern Command. Peter Deshazo, Director of the Americas Program for the Center for Strategic and International Studies, testified in March 2006 that the ASPA and Nethercutt Amendment were bringing about unintended consequences in Latin America that were affecting U.S. national interests in the region. He noted that the loss of IMET funds for 12 nations in the region meant hundreds of Latin American military officers would not receive U.S. sponsored training. In his opinion this would have a substantial negative impact on U.S. interests in the region such as adversely affecting regional and international security, enhancing anti-U.S. programs by ultra-nationalists on the left and right in Latin America, and encouraging Latin American countries to turn to other nations—possibly China, Russia, Cuba, or Venezuela—for assistance.⁷⁷

Adam Isacson, Director of Programs for the Center of International Policy, told Congress that countries in the region viewed U.S. efforts to have them sign Article 98 agreements as “bullying or arm-twisting, the opposite of a ‘good neighbor’ policy.” He also highlighted two messages Latin America leaders were receiving from these U.S. actions, testifying:

The first was, “The U.S. government, which often scolds us about our human rights records, is not trying to protect its soldiers from an international human rights body.” (This message was especially poorly timed, coming just as revelations of abuses at Abu Ghraib and Guantanamo began to surface.) The second message was, “The U.S. government doesn’t trust us not to extradite its military personnel to The Hague for frivolous reasons.”⁷⁸

General Bantz J. Craddock testified twice before Congress upon the effect IMET funding cuts had on U.S. interests in Latin America and the Caribbean while he was Commander, United States Southern Command. On both occasions he expressed the view that the cuts were hurting U.S. engagement and professional contact with regional militaries and were providing China an opportunity to exert greater influence in the region.⁷⁹ In summarizing the impact, General Craddock stated:

[U]sing IMET to encourage ICC Article 98 agreements may have negative effects on long-term U.S. security interests in the Western Hemisphere, a region where effective security cooperation via face-to-face contact is absolutely vital to U.S. interests. IMET is a low-cost, highly effective component of U.S. security cooperation that builds and expands regional security forces’ professionalism and capabilities, enables a cooperative hemispheric approach to meeting transnational threats to national sovereignty, and facilitates the development of important professional and personal relationships that provide U.S. access and influence to key players in the region.⁸⁰

The U.S. Shifts Course

Congress and the Bush administration apparently reassessed both the degree to which they opposed the ICC and the manner in which this opposition was best expressed. On 31 March 2005 the U.N. Security Council, acting under Chapter VII of the U.N. Charter, adopted a resolution to refer reports about the situation in Darfur, Sudan to the ICC Chief Prosecutor. Rather than oppose the resolution, the U.S. abstained from voting, signaling for the first time a possible shift in the Bush administration's attitude toward the Court.⁸¹ During 2006, Bush administration officials began to acknowledge that the ICC had a legitimate role to play in international justice and that aid sanctions imposed by the ASPA and Nethercutt Amendment might be counterproductive.⁸² Senator John McCain also signaled his seeming support to use U.S. intelligence assets to acquire evidence of war crimes in Darfur for the purpose of furthering the ICC investigation and possible prosecutions.⁸³

Building upon the Bush Administration's softened policy stance toward the ICC, and perhaps in response to the statements of General Craddock and others, Congress passed a measure contained within the John Warner National Defense Authorization Act for Fiscal Year 2007 which repealed the ASPA's section restricting IMET funding for ICC members that had not signed Article 98 agreements. President Bush signed this legislation, passed by Congress on 30 September 2006, on 17 October 2006.⁸⁴ In November 2006 President Bush waived ESF restrictions under the Nethercutt Amendment for 14 nations that had ratified the Rome Statute but not entered into bilateral Article 98 agreements.⁸⁵

Based upon these congressional and presidential actions, significant steps were taken toward divorcing a nation's receipt of U.S. military and economic aid from its status as a signatory to the Rome Statute. This is not to say that all links were removed. The ASPA still prohibits FMF aid to nations that are a party to the Statute. Moreover, State Parties still require a presidential waiver under the Nethercutt Amendment to obtain ESF aid, a barrier that continues to affect three nations.⁸⁶ Nevertheless, it is clear that by the end of 2006 Congress and President Bush were taking a more practical and perhaps engaging path regarding the U.S. relationship with the ICC. More, however, should be done to repair the harm that has resulted from U.S. efforts to thwart the ICC's jurisdictional reach over Americans.

Recommended Future Actions

It is difficult to argue that the ASPA acts as a significant safeguard against the ICC asserting jurisdiction over U.S. citizens. Should an American servicemember or government official be indicted by the ICC, jurisdictional issues will hinge on considerations such as whether the alleged offense constitutes a crime that the Court is authorized to prosecute, whether the indicted individual is physically present in a country that will surrender him to the ICC, and whether the Court will chose to forego exercising jurisdiction based on complementarity considerations. The ASPA does not significantly influence any of these considerations.⁸⁷

Furthermore, The ASPA's sweeping prohibitions against any form of U.S. cooperation with the ICC are more symbolic than meaningful. The U.S. is under no obligation to cooperate with the ICC because the U.S. is not a State Party to the Rome Statute. Consequently, in the absence of the ASPA the U.S. would be capable of

cooperating, or not cooperating, with the ICC on a case-by-case basis as our national interests dictated. This is exactly the same situation that currently exists under the ASPA given the Act's provisions authorizing the President to waive all cooperation prohibitions and provide assistance to the Court when it is in the national interest to do so.⁸⁸ Given the ineffectiveness of the ASPA to meaningfully insulate Americans from the ICC's jurisdiction, Congress should go beyond merely exempting IMET aid restrictions from its provisions and rescind the Act entirely.

Repealing the ASPA would completely divorce American foreign military aid, an important instrument used to further American strategic interests,⁸⁹ from the issue of whether a country is a State Party to the Rome Statute and would abolish harsh language and prohibitions against cooperating with the ICC. These prohibitions are essentially meaningless in terms of protecting Americans from ICC prosecution yet stand as a powerful symbolic message to the rest of the world community that America, despite its long tradition of staunchly advocating for justice and personal accountability in instances of genocide, war crimes, and crimes against humanity, considers itself above the rule of law as embraced by a majority of the world's nations and virtually every one of its significant allies.

For these same reasons, Congress should not renew⁹⁰ the constraints on ESF funds that are currently embodied in the Nethercutt Amendment. Given the extensive waivers President Bush has recently authorized, the Nethercutt Amendment is no longer relevant as a tool to coerce Article 98 agreements. It should not be allowed to continue as a possible barrier to providing ESF funds that serve as yet another vital instrument available to the U.S. to further important strategic goals, particularly in the areas of encouraging democratic reforms and strengthening rule of law institutions.⁹¹

The U.S. should also curtail the zeal with which it has pursued bilateral Article 98 agreements. These agreements have been more successful in antagonizing nations and sowing doubt as to America's true commitment to the rule of law than they have been in providing any true protection from ICC prosecution. To regain the high ground, the Bush Administration should consider offering nations the opportunity to renounce any Article 98 agreements that have been signed with no adverse consequences should a nation choose to withdraw. For nations that choose to keep the agreements in place, there can be no criticism that the agreement is the result of threats, coercion, or blackmail on the part of the U.S. Those that exit the agreement can testify to the U.S. acting constructively on concerns that the Article 98 agreements may have placed partner nations in an untenable position of having to choose between U.S. friendship and honoring international obligations under the Rome Statute. In the end, the U.S. loses very little in terms of possible protection for its citizens facing ICC prosecution yet it achieves a significant diplomatic victory and valuable publicity at a time when the U.S. can use some international goodwill.

Taking the actions recommended above will go a long way toward repairing the harm that has been done over the past five years. It does not, however, do anything to address an underlying concern that gave rise to President Bush's "unsigned" of the Rome Statute; namely, how can America best protect its servicemembers and government officials from unwarranted prosecution by the ICC? The answer, for now, is not to "resign" and ratify the Rome Statute; rather, it is to rely upon the complementarity provisions of the Statute to shield U.S. citizens from ICC action.⁹²

Few nations or their militaries do a better job than the U.S. in terms of investigating and, when warranted, prosecuting their citizens and servicemembers for committing crimes. The U.S. civilian and military court systems are mature, experienced, and fully capable of protecting fundamental individual rights and achieving fair results in criminal cases. The U.S. should play to its strength and continue to do what it does best which is hold its citizens accountable for wrongs they commit. When this is done, the ICC must defer to the U.S. legal system, regardless of the outcome. To the extent that U.S. civilian or military law does not fully allow for the prosecution of a U.S. citizen alleged to have committed a crime covered by the Rome Statute, then U.S. law should be changed to make its coverage as coextensive as possible with the Statute.⁹³

Conclusion

Aggressively seeking Article 98 agreements and cutting important ESF and military assistance funds all in the name of opposing the ICC has negatively impacted U.S. strategic interests articulated by the 2002 National Security Strategy which, in large measure, are still applicable today.⁹⁴ These measures built resentment among our allies and other nations we hoped to persuade to be allies at a time when we needed to build coalitions to fight wars in Afghanistan and Iraq; they reduced our ability to fight terrorism and other transnational threats to the U.S. and made it more difficult to equip our friends and allies to do the same; and at a time when America most needed to demonstrate to the world our ability to lead in the cause of justice and respect for the

rule of law, they sent the message that America considered itself separate from the rest of the international community and its accepted new Court designed to hold accountable individuals who commit the most heinous of crimes.

The U.S. need not join the ICC, but experience has shown that it does not serve American interests to subvert it. The U.S. should take steps to assure the international community that it can and will coexist peacefully and, when it serves American interests, cooperatively with the ICC. Doing so will reaffirm American leadership as a champion of international justice.

Endnotes

¹ U.S. Congressional Research Service, U.S. Policy Regarding the International Criminal Court, Jennifer K. Elsea, (Washington, DC, Library of Congress, 9 July 2002), 1; David J. Scheffer, "Staying the Course with the International Criminal Court," Cornell International Law Journal 35 (November, 2001 – February, 2002): 51-52. As of 1 January 2007, 104 nations are States Parties to the Rome Statute of the International Criminal Court. International Criminal Court, "The States Parties to the Rome Statute," available from <http://www.icc-cpi.int/asp/statesparties.html>; Internet; accessed on 13 April 2007.

² Elsea, 2; William K. Lietzau, "International Criminal Law After Rome: Concerns From a U.S. Military Perspective," Law and Contemporary Problems 64, no. 1 (Winter 2001): 119; M. Tia Johnson, "The American Servicemembers' Protection Act: Protecting Whom?," Virginia Journal of International Law 43 (Winter 2003): 427-29.

³ A full discussion of the Rome Statute and the legal analysis and debate surrounding its more contentious provisions such as jurisdiction over non-State Parties, its relation to the U.N., the role of the Court Prosecutor, and the future enforcement of the yet-to-be-defined crime of aggression, is beyond the scope of this paper.

⁴ Scheffer, 51-52; Philippe Kirsch, Q.C., "The International Criminal Court: Current Issues and Perspectives," Law and Contemporary Problems 64, no. 1 (Winter 2001): 3.

⁵ Jordan J. Paust, "The Reach of ICC Jurisdiction Over Non-Signatory Nationals," Vanderbilt Journal of Transnational Law 33 (2000): 1.

⁶ Michael N. Schmitt and Peter J. Richards, "Into Uncharted Waters, The International Criminal Court," Naval War College Review 53, no. 1 (Winter 2000): 93.

⁷ Ibid. Joining the United States in opposing the Rome Statute were China, Iraq, Israel, Libya, Qatar, and Yemen.

⁸ "Rome Statute of the International Criminal Court," Article 125, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 183/9th (2002). Signature of the Statute prior to 31 December 2000 would permit a state to continue to fully participate in the development of the Court's rules and procedures in preparation of the Court coming fully into force. After 31 December 2000, a state would have to fully accede to the Statute by way of ratification to become a State Party to the ICC and participate in the development and functioning of the Court. Scheffer, 56. Although a state may have signed, but not ratified, the Statute it would still be bound to respect the overall objectives of the Statute. Under accepted international law, specifically the "Vienna Convention on the Law of Treaties," once a nation has signed an international treaty such as the Rome Statute, it may not take steps or actions to undermine the object and purpose of the treaty, even if the nation has not formally ratified it. U.S. Congressional Research Service, U.S. Policy Regarding the International Criminal Court, Jennifer K. Elsea, (Washington, DC, Library of Congress, Updated 14 June 2006), 4, footnote 17.

⁹ "Rome Statute," Article 126(1).

¹⁰ Parts 1 and 2 of the Statute encompass Articles 1 through 21.

¹¹ Making the ICC a permanent institution distinguishes it from ad hoc tribunals authorized by the U.N. or a coalition of nations to investigate and prosecute war crimes or other atrocities related to particular conflicts.

¹² Ibid., Article 1.

¹³ Ibid., Article 5(1). Articles 6-8 of the Statute define the crimes of genocide, crimes against humanity, and war crimes, respectively, and detail specific acts that qualify as violations. Of note, however, is the fact that while the Statute lists the crime of aggression as an offense over which the Court has jurisdiction, the Statute leaves the crime undefined. Moreover, under Article 121, the Statute cannot be amended until seven years pass from the time the Statute enters into force. Until an amendment defining the crime of aggression is adopted by the states that are party to the Statute, the Court effectively has no jurisdiction to investigate or prosecute alleged crimes of aggression.

¹⁴ It is probably more accurate to think of the four crimes listed under the ICC's jurisdiction as groups of crimes. A review of the particular acts that qualify as genocide, crimes against humanity, or war crimes under Articles 6-8 reveal several offenses that are typically considered distinct crimes such as rape, murder, kidnapping, torture, and false imprisonment.

¹⁵ Ibid., Article 13. Article 15 gives the Chief Prosecutor express authority to initiate an investigation.

¹⁶ Ibid., Article 12. Neither of these jurisdictional preconditions is necessary for the Court to exercise its jurisdiction when the U.N. Security Council, acting under its Chapter VII authority, refers a matter to the Court. Article 12(3) also provides that a state not a party to the Rome Statute may, nevertheless, accept the exercise of the Court's jurisdiction in a particular matter without formally becoming a Party State. An example of such an action would be an instance in which a non-State Party referred a matter to the Court for investigation. Should a state elect to accept the Court's jurisdiction in a particular matter, it must fully cooperate with the Court and essentially assume all of the obligations of a State Party for the duration of the investigation and prosecution. This final provision, as reinforced by Rule 44(2) of the Court's Rules of Procedure and Evidence, would require a non-State Party to open itself to the Court's scrutiny of its own conduct in a particular matter. The purpose behind this provision was to lessen the chance that a rogue or aggressor state might use the ICC as a vehicle to further its own politically motivated agenda. Scheffer, 77-78.

¹⁷ The Chief Prosecutor's ability to initiate an investigation is subject to some degree of scrutiny and approval. Article 15 of the Statute requires the prosecutor to obtain the approval of the Court's Pre-Trial Chamber before proceeding with an investigation. "Rome Statute," Article 15. This three-person body must vote at least 2 to 1 in favor of the investigation in order for the Chief Prosecutor to proceed.

¹⁸ Ibid., Article 17(1). For purposes of Article 17 admissibility determinations, the Statute does not require the state taking action in the matter to be a State Party.

¹⁹ Ibid., Article 17(1)(b). The ICC has elaborated upon what is meant by the concept of complementarity under the Rome Statute stating:

[I]n deciding whether to investigate or prosecute, the Prosecutor must first assess whether there is or could be an exercise of jurisdiction by national systems with respect to particular crimes within the jurisdiction of the Court. The Prosecutor can proceed only where States fail to act, or are not "genuinely" investigating or prosecuting, as described in article 17 of the Rome Statute

. . . .

A State is *unwilling* if the national decision has been made and proceedings are or were being undertaken for the purpose of shielding the person concerned from criminal responsibility; there has been an unjustified delay which is inconsistent with an intent to bring the person concerned to justice; or the proceedings were not or are not being conducted independently or impartially. To assess whether a State is *unable* to act, the Prosecutor will need to determine whether “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.” This provision was inserted to take account of situations where there was a lack of central government, or a state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems which prevents the State from discharging its duties to investigate and prosecute crimes within the jurisdiction of the Court.

International Criminal Court, Office of the Prosecutor, “Paper on Some Policy Issues Before the Office of the Prosecutor” (September 2003) available from http://www.icc-cpi.int/library/organs/otp/03095_policy_paper.pdf; Internet; accessed 24 April 2007 (*italics original*).

²⁰ Explicit in the terms of Article 17, however, is the requirement that actions taken by a national judiciary are legitimate and not a sham proceeding to protect an individual from possible ICC prosecution. For example, the ICC will give deference to a decision by a state not to prosecute an individual alleged to have committed war crimes “unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.” The same holds true for the Court refraining from prosecuting an individual already tried for the conduct which is the subject of a complaint lodged with the ICC provided, under Article 20 of the Statute, the prosecution was not “for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court or otherwise were not conducted independently or impartially in accordance with the norms of due process . . . and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

²¹ Scheffer, 63.

²² Scheffer, 64; Christopher M. Van de Kieft, “Uncertain Risk: The United States Military and the International Criminal Court,” *Cardozo Law Review* 23 (August 2002): 2327 (“By signing the treaty prior to January 1, 2001, the United States preserved its ability to influence the ICC’s pre-establishment activities; had the United States waited one day longer, ratification would have been required to influence these proceedings.”).

²³ President Clinton stated, “I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.” Lilian V. Faulhaber, “American Servicemembers’ Protection Act of 2002, Recent Developments,” Harvard Journal on Legislation 40 (2003): 542.

²⁴ For an insider’s look regarding U.S. concerns during the negotiations leading to the vote creating the Rome Statute and U.S. efforts to address these concerns prior to President Clinton authorizing the signature of the Statute, see Scheffer, 55-98. Mr. Scheffer was formally the U.S. Ambassador at Large for War Crimes Issues (1997-2001) and head of the U.S. delegation to the United Nations talks on the ICC.

²⁵ Marc Grossman, Under Secretary of State for Political Affairs, “American Foreign Policy and The International Criminal Court,” Remarks to the Center for Strategic and International Studies, Washington, DC, 6 May 2002 available from <http://www.state.gov/p/us/rm/9949.htm>; Internet; accessed 24 April 2007; Johnson, 444; Elsea, 14 June 2006 update, 5. The legal objection is based on the fundamental international law principal that a treaty cannot create rights or obligations on states that are not a party to the treaty.

²⁶ Johnson, 444.

²⁷ Article 25 makes clear that the Court’s jurisdiction covers not only those who actually commit a crime but also those who order, solicit, or induce the commission of a crime. Moreover, Articles 27 and 28 unambiguously state that acts committed by government officials or military commanders in the course of carrying out their official duties will not be exempt from the Court’s jurisdiction. Article 27, entitled “Irrelevance of Official Capacity,” states:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28, entitled “Responsibility of Commanders and Other Superiors,” states, in part:

A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That the military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

“Rome Statute,” Articles 25, 27, and 28.

²⁸ Johnson, 448-49; Grossman remarks to the Center for Strategic and International Studies; Elsea, 14 June 2006 update, 7. A possible scenario in which this might arise is if a state were to undertake a peacekeeping action that its government felt was valid under international law, it would have neither the reason nor the will to investigate the action when faced with a complaint thus not availing itself of the complementarity provisions of the Statute. This would then permit the ICC to assert jurisdiction over government officials or military leaders issuing orders in furtherance of the operation and possibly prosecute the individuals for acts committed in their official capacity in what the state considered a legitimate action. Van de Kieft, 2336.

²⁹ Article 15 states, in part, “The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.” “Rome Statute,” Article 15(1).

³⁰ Van de Kieft, 2336; Johnson, 455, Grossman remarks to the Center for Strategic and International Studies; Elsea, 14 June 2006 update, 8.

³¹ Bosnia & Herzegovina, Bulgaria, Cambodia, Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia all deposited their treaty instruments with the United Nations on 11 April 2002 marking their official ratification of the Rome Statute. Coalition for the International Criminal Court Fact Sheet, “A Timeline of the Establishment and Work of the International Criminal Court” available from http://www.iccnw.org/documents/CIICFS_Timeline_Current.pdf; Internet; accessed 28 April 2007.

³² “Rome Statute,” Article 126(1).

³³ Many commentators, particularly those who support the ICC, incorrectly refer to this as the U.S. “unsigned” of the Rome Statute.

³⁴ Eric M. Meyer, “International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers’ Protection Act,” Oklahoma Law Review 58 (2005): 104.

³⁵ Faulhaber, 543.

³⁶ U.N. Security Council Resolution 1442 (2002), adopted by the Security Council at its 4572nd meeting, 12 July 2002. The Security Council renewed this request in U.N. Security Council Resolution 1487 (2003), adopted by the Security Council at its 4772nd meeting, 12 July 2003. Although this resolution, as with the prior resolution, expressed the Security Council’s intent to continually renew this request each year, no further requests have been made. Elsea, 14 June 2006 update, 4.

³⁷ The category of U.S. personnel covered by these agreements is, in most instances, quite broad. Most agreements define covered U.S. personnel as current and former U.S. personnel working in the partner country and employees such as non-American civilian defense contractors regardless of nationality. “US Launches Global Campaign for Impunity,” The International Criminal Court Monitor (September 2002), 15. Some critics argue the scope of coverage is even greater encompassing any citizen of the U.S. or partner state to the agreement traveling through, conducting personal business or vacationing in the U.S. or the partner state. Meyer, 124.

³⁸ Article 98, entitled “Cooperation with Respect to Waiver of Immunity and Consent to Surrender.” Reads:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

“Rome Statute,” Article 98.

³⁹ There are reportedly three different types of Article 98 agreements that have been executed. The first two are agreements entered into between the U.S. and a nation that has signed or ratified the Rome Statute. One type provides that both parties agree not to surrender each other's personnel to the ICC without the consent of the other party. Another type prohibits the second state from surrendering U.S. personnel to the ICC but does not place the same restriction on the U.S. A third type of agreement exists for states that have neither signed nor ratified the Rome Statute. Pursuant to these agreements, the relevant provisions require "those states not to cooperate with efforts of third states to surrender persons to the [ICC]." Meyer, 116-17.

⁴⁰ Reference to Article 98 agreements as "bilateral immunity agreements" is misleading. The purpose of the agreements is to prevent the surrender of personnel from either country to the ICC without the express consent of their government. The agreements do not "immunize" the personnel from responsibility for any atrocities they may have committed; at most the agreements immunize the personnel from being surrendered to the Court. David J. Scheffer, "Article 98(2) of the Rome Statute: America's Original Intent," Journal of International Criminal Justice 3 (2005): 335, footnote 4.

⁴¹ Although the primary U.S. concern centers on entering agreements with nations that have signed or ratified the Rome Statute, the Department of State has actively sought such agreements with as many nations as possible. Elsea, 14 June 2006 update, 25; Amitabh Pal, "Blanket Immunity: Bush Twists Arms to Evade Court," The Progressive, 2007 Westlaw News Reporter 894977 (1 January 2007) ("Our ultimate goal is to conclude (these) agreements with every country in the world, regardless of whether they have signed or ratified the ICC, regardless of whether they intend to in the future," John Bolton, then-Undersecretary of State for Arms Control and International Security, remarked in 2002.)).

⁴² Congressional efforts to enact the American Servicemembers' Protection Act began in 2000. Various versions of the Act were proposed by Senator Helms in 2000 and again by Senator Helms and Representative DeLay in 2001 but never signed into law. Representative DeLay was successful in passing this legislation in 2002. Faulhaber, 544.

⁴³ American Servicemembers' Protection Act, Public Law 107-206, Title II, § 116 U.S. Statutes at Large 889 (2002), codified at U.S. Code 22 (2002), §§ 7421 et. seq.; Elsea, 14 June 2006 update, 4; Faulhaber, 544-45.

⁴⁴ Certain portions of the ASPA were subsequently amended. The general prohibitions regarding cooperation with the ICC, however, are still in effect.

⁴⁵ Specific prohibitions include: transmitting letters rogatory addressed to U.S. courts, agencies, or officials; extraditing any person from the U.S. to the ICC; using any appropriated funds to assist in the investigation, arrest, detention, extradition, or prosecution of any U.S. citizen by the ICC; providing any assistance to the ICC as might be requested by another nation under a mutual legal assistance treaty; and, allowing any agent of the ICC to conduct in the U.S. or any territory subject to U.S. jurisdiction, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other ICC proceeding. ASPA, U.S. Code 22, § 7423.

⁴⁶ Ibid.

⁴⁷ ASPA, U.S. Code 22, § 7430.

⁴⁸ ASPA, U.S. Code 22, § 7433.

⁴⁹ The specific certifications are: (1) the U.N. Security Counsel permanently exempts participating U.S. servicemembers from ICC jurisdiction and prosecution for actions undertaken by them in connection with the operation; (2) each country in which participating U.S. servicemembers will be present either is not a State Party to the Rome Statute or, if a State Party, has executed an Article 98 agreement with the U.S.; or, (3) the national interests of the U.S. justify participation in the peacekeeping or peace enforcement operation. ASPA, U.S. Code 22, § 7424. In the unlikely event that a U.S. servicemember, or any other U.S. citizen, should be detained by the ICC, Congress authorized the President “to use all means necessary and appropriate to bring about the release” of an American or other person covered by the Act “who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.” ASPA, U.S. Code 22, § 7427. This provision has led critics to dub the ASPA the “Hague Invasion Act” as the ICC is headquartered at The Hague. Faulhaber, 546. Interestingly, though Congress authorized to President to use “all means necessary and appropriate,” which arguably includes the use of force to free an American detained by the ICC, Congress did feel compelled to set a limit on just how far the President can act by specifically proscribing “the payment of bribes or the provision of other such incentives to induce the release of a person” ASPA, U.S. Code 22, § 7427.

⁵⁰ ASPA, U.S. Code 22, § 7426.

⁵¹ Bahrain, Kuwait, Morocco, Pakistan, the Philippines, Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, New Zealand and Thailand are all considered major non-NATO allies. U.S. Congressional Research Service, Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America, Clare M. Ribando, (Washington, DC, Library of Congress, 10 April 2006), 2, footnote 4.

⁵² ASPA, U.S. Code 22, § 7426.

⁵³ The ASPA defines “United States military assistance” as: “(A) assistance provided under chapter 2 or 5 of part II of the Foreign Assistance Act of 1961; or (B) defense articles or defense services furnished with the financial assistance of the United States Government, including through loans and guarantees, under section 2763 of this title.” ASPA, U.S. Code 22, § 7432.

⁵⁴ Elsea, 14 June 2006 update, 2.

⁵⁵ FY2005 Consolidated Appropriations Act, Public Law 108-447, § 574.

⁵⁶ Additionally, the Nethercutt Amendment specifically exempted from its coverage nations that were otherwise eligible for assistance under the Millennium Challenge Act of 2003. Ibid.

⁵⁷ FY2006 Consolidated Appropriations Act, Public Law 109-102, § 574. The renewed Nethercutt Amendment read virtually the same as the one passed the previous year with two significant exceptions: (1) the President was now authorized to waive the restriction on providing ESF funds to any nation regardless of ICC membership status or whether it had signed an Article 98 agreement with the U.S. provided the President certified it was important to the national interests of the U.S.; and, (2) ESF funds that had been appropriated under the Fiscal Year 2005 Consolidated Appropriations Act could be made available to all countries for democracy and rule of law programs and activities.

⁵⁸ George W. Bush, The National Security Strategy of the United States of America (Washington, DC: The White House, September 2002).

⁵⁹ For example, “Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends,” NSS, 5. Overall, the 2002 NSS listed eight security strategy objectives: Champion Aspirations for Human Dignity; Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends; Work with others to Defuse Regional Conflicts; Prevent Our Enemies from Threatening U., Our Allies, and Our Friends with Weapons of Mass Destruction; Ignite a New Era of Global Economic Growth through Free Markets and Free Trade; Expand the Circle of Development by Opening Societies and Building the Infrastructure of Democracy; Develop Agendas for Cooperative Action with the Other Main Centers of Global Power; and, Transform America’s National Security Institutions to Meet the Challenges and Opportunities of the Twenty-First Century.

⁶⁰ NSS, 3.

⁶¹ The relevant section of the NSS reads:

In the Western Hemisphere we have formed flexible coalitions with countries that share our priorities Together we will promote a truly democratic hemisphere where our integration advances security, prosperity, opportunity, and hope Parts of Latin America confront regional conflict, especially arising from the violence of drug cartels and their accomplices. This conflict and unrestrained narcotics trafficking could imperil the health and security of the United States. Therefore, we have developed an active strategy to help the Andean nations adjust their economies, enforce their laws, defeat terrorist organizations, and cut off the supply of drugs. . . .

Ibid., 10.

⁶² Under the Rome Statute, U.N. referral of a matter to the ICC is only one of three different ways in which a matter can be brought to the ICC for consideration. Unaffected by the U.S. request for U.N. immunity would be matters brought to the ICC by other State Parties and matters brought under investigation by the Chief Prosecutor acting on his or her own authority. See endnotes 15-16 and accompanying text.

⁶³ See endnotes 35-36 and accompanying text.

⁶⁴ Denmark's Permanent Representative to the U.N., H.E. Ambassador Ellen Margrethe Løj, speaking on behalf of the European Union noted to the U.N. Security Counsel:

It is understandable that the United States is seeking protection from politically motivated accusations. The EU however believes that these concerns have been met and that sufficient safeguards against politically motivated accusations have been built into the Statute.

Furthermore, the European Union has carefully examined the letter of the Secretary-General conveyed to the US Secretary of State and circulated to members of the Security Counsel. We have especially noted the following passage: "I think that I can state confidently that in the history of the United Nations, and certainly during the period that I have worked for the Organization, no peacekeeper or any other mission personnel have been anywhere near the kind of crimes that fall under the jurisdiction of the ICC. The issue that the United States is raising in the Council is therefore highly improbable with respect to United Nations peacekeeping operations. At the same time, the whole system of United Nations peacekeeping operation is being put at risk." We fully agree with the Secretary-General's statement

Ellen Margrethe Løj, Danish Ambassador and Permanent Representative to the U.N., Statement Before the U.N. Security Council on the Situation in Bosnia (International Criminal Court), New York City, New York, 10 July 2002 available from http://www.iccnw.org/documents/EUDenmarkOpenSC10_July02.pdf; Internet; accessed 2 May 2007.

⁶⁵ The message gleaned by others was that the U.S. was willing to resort to blackmail of the U.N. to try and achieve its objectives. Pascal K. Kambale, "The United States attacks the International Criminal Court: Africa Must Consolidate its Resistance," The International Criminal Court Monitor 23 (February 2003), 7.

⁶⁶ Faulhaber, 555. Condemnation of U.S. efforts to secure Article 98 agreements by withholding aid was widespread. Non-governmental organization representatives noted the disconnect between U.S. statements supporting the rule of law and its actions seeking protection from the ICC.

Victims and the world community view the US as a hegemonic super power that refuses to be under the rule of law, and yet imposes its own order on other states and citizens. The US' intention to create a two-tier justice system, one for the rest of the world and one for Americans, is just unacceptable. The US cannot be above the law.

Irune Aguirrezabal Quijera, "The United States' Isolated Struggle Against the ICC," The International Criminal Court Monitor 25 (September 2003), 11;

All citizens of the world would be equal before this international justice system, with the exception of US nationals. . . . It is ironic that the United States which has made the rule of law the cornerstone of its diplomacy, is now using economic aid to coerce countries not to respect their obligations under an international convention which has become domestic law in those countries that have ratified the treaty.

Kambale, 11. Other commentators have also noted the possibility that countries may be violating their own domestic laws and international obligations by signing Article 98 agreements with the U.S.

Officials from a number of governments have stated publicly that they believe the [BIAs] violate their international treaty obligations, their domestic laws and in some cases even their constitutions. Several States have signed agreements only in the face of what their diplomats have labeled "unbearable" pressure, including threats to cut not only military aid, but humanitarian aid, and economic assistance as well.

Meyer, 131. Criticism flowed equally from international press and country leaders who resented, and resisted, U.S. pressure.

“This is blackmail!” declared the Sunday Nation in an editorial in Kenya. And the Daily Nation Quoted a member of Kenya’s Parliament, Paul Muite, as saying: “They can keep their dollars as long as they [do not] respect our dignity. It is not only Americans who can train our military personnel, and it is time we started looking at the European Union, China, South Africa or even Japan for such training.”

Nicholas D. Kristof, “Schoolyard Bully Diplomacy,” New York Times, 2005 Westlaw News Reporter 16751166 (16 October 2005). Adam Isacson, Director of Programs for the Center for International Policy offered sentiments from government officials in other nations in his testimony before Congress in 2006: “[Signing an Article 98 agreement] would go against the multilateral order and against the principles of defense of human rights. . . . We may be poor, but we have our dignity.” Costa Rican Foreign Minister Roberto Tovar, September 2005; “We will not change our principles for any amount of money. We’re not going to [go] belly up for \$300,000 in training funds.” Barbadian ambassador to the Organization of American States Michael I. Kint, August 2005; “We will assume any consequences that might result from our signature [of the Rome Statute]. It is a signature that comes from our principles and this government’s political convictions. Whether or not there will be a reduction in U.S. aid is not relevant to us, what is relevant is that our convictions and principles mean something.” Mexican Presidency spokesman Ruben Aguilar, February 2006; “Peru will not sign any agreement that impedes it from submitting any country’s citizens to the jurisdiction of the International Criminal Court. Peru rejects pressure from any other country on its foreign policy.” Peruvian Foreign Minister Manuel Rodriguez, August 2004. Adam Isacson, “The Impact on Latin America of the Servicemembers’ Protection Act,” Testimony Before the Western Hemisphere, Peace Corps, and Narcotics Affairs Subcommittee, Committee on Foreign Relations, United States Senate (8 March 2006) available from <http://ciponline.org/colombia/060308isac.pdf>; Internet; accessed 5 May 2007.

⁶⁷ These guiding principles likely resulted from a significant frustration felt by members of the European Parliament on the U.S. approach to the ICC. Illustrative of this frustration is a motion that was prepared for presentation to Parliament in which the U.N. Security Counsel is called to task for bowing to U.S. pressure seeking immunity for its forces engaged in U.N. peacekeeping operations, the U.S. is criticized for aggressively seeking bilateral Article 98 Agreements, and all nations are urged not to enter into such agreements. While it is unclear from research whether the motion was ever offered for debate and vote before the European Parliament, the following excerpts demonstrate the sentiments that appear to have been prevalent within at least a portion of the legislative body:

Regretting the UN Security Council's Resolution 1422 adopted on the 12th of July 2002 on United Nations established or authorized operations, whereby the ICC shall not commence or proceed with investigation or prosecution of any case of acts or omissions from current or former officials or personnel from a contributing State not a party to the Rome Statute, for the period of one year starting on the 1st of July 2002 and with the possibility of renewal each 1st of July for further 12 month period,

whereas the current world-wide political pressure by the Government of the United States of America to persuade States Parties and Signatory States of the Rome Statute as well as non-signatory states to enter into bilateral immunity agreements which seek, under misuse of its article 98, to prevent US government officials, employees, or military personnel or (Greens) nationals from being surrendered to the International Criminal Court, should not succeed with any country, in particular with the EU Member States, the applicant countries to the EU, the countries concerned in the Stabilisation [sic] and Association Process, the countries associated with the EU in the Euro-Mediterranean partnership, the Mercosur, Andean Pact and San Jose Process countries, as well as with the ACP countries,

insisting that at the EU Council next 30 September 2002, the common guidelines to be adopted shall not reflect any step backwards in the EU support to the full effectiveness of the ICC and shall respect the letter and the spirit of the EU common position already adopted in this regard,

firmly believes that the ICC States Parties and Signatory States have the obligation under international law not to defeat the object and purpose of the Rome Statute under which, according to Preamble of the Rome Statute, "the most serious crimes of concern to the international community as a whole must not go unpunished" and that States Parties are obliged to cooperate fully with the Court, in accordance with Art 86 of the Rome Statute, thus preventing them from entering into immunity agreements that extract certain citizens from the State's or the International Criminal Court's jurisdictions, undermining the full effectiveness of the ICC and jeopardising [sic] its role as a complementary jurisdiction to the State jurisdictions' and a building block in global collective security.

European Parliament, Common Motion for a Resolution, B5-..../2002 (19 September 2002) available from http://www.iccnw.org/documents/EP%20resolution_19sept02.pdf; Internet; accessed 2 May 2007.

⁶⁸ Note to Council of the European Union from General Secretariat of the Council, "Draft Council Conclusions on the International Criminal Court," document number 12488/1/02, Rev. 1 (30 September 2002) available from <http://www.iccnw.org/document/Euconclusions30sept02.pdf>; Internet; accessed 2 May 2007.

⁶⁹ European Union, "Declaration by the Presidency on Behalf of the European Union on the Nethercutt Amendment," document number 15864/1/04, Rev. 1 (10 December 2004) available from <http://www.iccnw.org/documents/Eustatementnethercutt10Dec04.pdf>; Internet; accessed 30 April 2007.

⁷⁰ Four European nations did realize aid cuts in fiscal years 2004 and 2005. Croatia lost all of its IMET and FMF funds in both years totaling \$5.8 million and \$50,000 respectively. Cyprus experienced a cut of \$108,000 in ESF aid for fiscal year 2005. Malta lost all of its IMET and FMF funds for both years totaling \$1.25 million and \$125,000 respectively. Serbia and Montenegro also lost all of its IMET and FMF funds totaling \$250,000 for each of the two years. Coalition for the International Criminal Court, "Countries Opposed to Signing a US Bilateral Immunity Agreement (BIA): US Aid Lost in FY04 & FY05 and Threatened in FY06," available from http://www.iccnw.org/documents/countriesopposedbia_aidloss_current.pdf; Internet; accessed 26 April 2007. Bulgaria, Lithuania, and Estonia each provided assistance to U.S. war efforts in Iraq yet saw their military aid from the U.S. (\$1.2 million, \$4 million, and \$2.75 million respectively) suspended, though ultimately restored. The U.S. suspended aid to Bulgaria despite having allowed U.S. planes to use one of its air bases while en route to Iraq. The U.S. suspended aid to Lithuania and Estonia even though both nations sent troops to Iraq. This treatment of European states by the U.S. has been characterized as "a slap in the face." Meyer, 130. A wider, though unquantified, impact from ASPA restrictions on military aid was articulated by General Bantz J. Craddock, in his responses to advance questions from the Senate Armed Services Committee prior to his 19 September 2006 testimony in connection with his nomination to become Commander, United States European Command and Supreme Allied Commander Europe. Responding to a question regarding whether he supported modifying ASPA, General Craddock stated:

I have and continue to support ASPA as protection for our servicemembers worldwide. Having said that—I believe there are negative unintended consequences that impact half of the 92 countries in Europe and Africa through lost opportunities to provide professional military training with military officers and noncommissioned officers. I have and will continue to advocate for a ‘delinking’ of International Military Education and Training (IMET) funding from the ASPA sanction.

Senate Armed Services Committee, “Advance Questions for General Bantz J. Craddock, USA, Nominee for Commander, United States European Command and Supreme Allied Commander, Europe,” (September 2006), 27 available from <http://armed-services.senate.gov/statement/2006/september/craddock%2009-19-6.pdf>; Internet; accessed 26 April 2007.

⁷¹ The listed countries lost the following amounts of IMET and FMF aid for fiscal years 2004 and 2005, respectively: Benin--\$500,000/\$250,000; Lesotho--\$125,000/\$50,000; Mali--\$350,000/\$175,000; Namibia--\$225,000/\$100,000; Niger--\$200,000/\$100,000; South Africa--\$7.6 million/\$50,000; Tanzania--\$230,000/\$100,000. Additionally, an extra \$1.53 million in ESF aid was cut in fiscal year 2005 under the Safe Skies program which provided funding to Kenya, Mali, Namibia, and Tanzania, among others. Coalition for the International Criminal Court, “Countries Opposed to signing a US Bilateral Immunity Agreement (BIA): US Aid Lost in FY04 & FY05 and Threatened in FY06.”

⁷² Ibid.

⁷³ Pamela Hess, “Ungoverned Areas Threaten North Africa,” The Post Chronicle, 17 February 2006 available from www.postchronicle.com/news/security/article_2127155.shtml; Internet; accessed 4 May 2007 (“‘What I see is [extremists] are moving back into the ungoverned area,’ said Maj. Gen. Jonathan S. Gration, the director of strategy, policy and assessments for U.S. European Command. ‘more recently we are seeing extremists with battlefield experience coming back from Iraq and Afghanistan’ to North Africa. ‘Terrorists continue to operate freely in ungoverned areas. The threat is becoming transnational,’ he said. . . . ‘We’re severely restricted in what we can do,’ said Gration, an Air Force general who grew up in Africa and speaks fluent Swahili. ‘The restrictions we’re [sic] put on our ability to move in Africa may be hurting the very people we are trying to help.’”).

⁷⁴ Ibid. (“According to Gration, Chinese aid to Africa has increased more than 50 percent since 2004. ‘They are focused, well financed and they know what they are trying to achieve,’ he said. ‘We can’t give Kenya foreign military financing or (military training) but China offers it like crazy. Kenya doesn’t have another option. They go in, give aid, and say what do you want? We go in and say, this is what you need and we can’t give it to you,’ he said.”).

⁷⁵ The listed countries lost the following amounts of IMET and FMF aid for fiscal years 2004 and 2005, respectively: Brazil--\$500,000/\$50,000; Costa Rica--\$400,000/\$50,000; Ecuador--\$15.65 million/\$2.3 million; Paraguay—\$300,000/\$250,000; Peru—\$2.7 million/\$1.3 million; Trinidad & Tobago—\$450,000/\$50,000; Uruguay--\$1.45 million/ \$650,000; Venezuela--\$700,000/\$50,000. In fiscal year 2005, Bolivia lost \$3.8 million in military aid. Coalition for the International Criminal Court, “Countries Opposed to signing a US Bilateral Immunity Agreement (BIA): US Aid Lost in FY04 & FY05 and Threatened in FY06.” It should be noted that these figures are contradicted by other sources. For example, the Congressional Research Service reported only Bolivia losing military funding for fiscal year 2004 (\$589,000 lost in IMET funds, \$3.976 million lost in FMF funds). For fiscal year 2005 it reported six nations losing IMET and FMF funds. They were Bolivia (\$800,000 IMET/\$1.984 FMF), Ecuador (\$300,000 IMET/\$992,000 FMF), Paraguay (\$250,000 IMET), Peru (\$300,000 IMET/\$992,000 FMF), St. Vincent (\$133,000 IMET), and Uruguay (\$150,000 IMET/\$397,000 FMF). Ribando, 8.

⁷⁶ These nations were Bolivia with \$34,000 in ESF aid cut, Ecuador with \$1.1 million in ESF aid cut, Paraguay with \$821,000 in ESF aid cut, and Peru with \$4 million in ESF aid cut. Coalition for the International Criminal Court, “Countries Opposed to signing a US Bilateral Immunity Agreement (BIA): US Aid Lost in FY04 & FY05 and Threatened in FY06.”

⁷⁷ Peter DeShazo, “The Impact on Latin America of the American Servicemembers’ Protection Act,” Testimony Before the Western Hemisphere, Peace Corps, and Narcotics Affairs Subcommittee, Committee on Foreign Relations, United States Senate (8 March 2006) available from http://www.csis.org/media/isis/congress/ts060308_deshazo.pdf; Internet; accessed 6 May 2007.

⁷⁸ Adam Isacson, “The Impact on Latin America of the Servicemembers’ Protection Act,” Testimony Before the Western Hemisphere, Peace Corps, and Narcotics Affairs Subcommittee, Committee on Foreign Relations, United States Senate (8 March 2006) available from <http://ciponline.org/colombia/060308isac.pdf>; Internet; accessed 5 May 2007. Specifically addressing the compounding effect ESF cuts had when combined with the cuts in military aid, Mr. Isacson testified “Suddenly, badly needed development and democracy programs were in play, and even more resources were taken from the most potentially pro-U.S. governments in the region. Though an exception has been made for democracy and rule of law programs, Economic Support Funds to sanctioned Latin American countries will decline by more than 55 percent from 2003 to 2006, from \$52 million to \$23 million.”

⁷⁹ Bantz J. Craddock, Posture Statement of General Bantz J. Craddock, United States Army, Commander, United States Southern Command, House Armed Services Committee (9 March 2005), 6 available from <http://ciponline.org/colombia/050309crad.pdf>; Internet; accessed 26 April 2007; Bantz J. Craddock, Posture Statement of General Bantz J. Craddock, United States Army, Commander, United States Southern Command, Senate Armed Services Committee (14 March 2006), 26-27 available from <http://armed-services.senate.gov/statement/2006/march/craddock%2003-14-06.pdf>; Internet; accessed 26 April 2007.

⁸⁰ Craddock, Posture Statement Before House Armed Services Committee, 25. Testifying before the Senate Armed Services Committee one year later, General Craddock offered the following assessment:

[I]n 2005, one-third of the countries in our AOR were unable to participate in U.S.-sponsored military education. In 2003, the final year of IMET before the ASPA sanctions took effect, 25 percent (771) of the total number of students (3,128) trained from the AOR came from the countries that are now sanctioned. Providing opportunities for foreign military personnel to attend school with U.S. service members is essential to maintaining strong ties with our partner nations. Decreasing engagement opens the door for competing nations and outside political actors who may not share our democratic principles to increase interaction and influence within the region. It is well known that the Peoples Republic of China (PRC) has a long-term goal of partnering with the countries of Latin America. The PRC requires access to raw materials, oil, minerals, new markets, and diplomatic recognition. PRC imports from Latin America grew an average of 42 percent per year over the last four years. The PRC has been making headway into the region by using economic measures, employing diplomacy, building infrastructure, negotiating trade deals, and offering resources to cash-strapped militaries and security forces with no strings attached.

Craddock, Posture Statement Before Senate Armed Services Committee, 26-27.

⁸¹ Elsea, 14 June 2006 update, 24.

⁸² During a trip briefing while en route to Santiago, Chile, Secretary of State Condoleezza Rice stated that in some instances the withholding of aid to allies or countries with which the U.S. has important counter-terrorism or counter-drug programs has been, "in a sense, sort of the same as shooting ourselves in the foot." Condoleezza Rice, Secretary of State, Trip Briefing (10 March 2006) available from <http://www.state.gov/secretary/rm/2006/63001.htm>; Internet; accessed 26 April 2007.

Deputy Secretary of State Robert Zoellick stated in remarks to the Brookings Institution that the U.S. “accepted” the U.N. Security Council referral of the Darfur situation to the ICC and that “under our domestic law, if [the ICC] ask[s] for information and help, we try to provide that help.” Robert B. Zoellick, Deputy Secretary of State, Remarks at the Brookings Institution Forum on the Situation in Darfur (13 April 2006) available from <http://www.state.gov/s/d/former/zoellick/rem/2006/64622.htm>; Internet; accessed 6 May 2007. The Secretary of State’s Legal Advisor, John Bellinger, has also stated that the U.S. now acknowledges that the ICC has a legitimate role to play in international justice. Jess Bravin, “US Warms to Hague Tribunal, New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes,” *Wall Street Journal*, 14 June 2006 available from <http://www.globalpolicy.org/intljustice/icc/2006/0614warm.htm>; Internet; accessed 6 May 2007 (“While insisting the Bush administration will never allow Americans to be tried by the court, ‘we do acknowledge that it has a role to play in the overall system of international justice,’ John Bellinger, the State Department’s chief lawyer, said in an interview. . . . In a May speech, Mr. Bellinger said ‘divisiveness over the ICC distracts from our ability to pursue these common goals’ of fighting genocide and crimes against humanity.”).

⁸³ John McCain and Bob Dole, “Rescue Darfur Now,” *Washington Post*, 10 September 2006, sec. B7 available from <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/08/AR2006090801664.html>; Internet; accessed 6 May 2007 (“U.S. and allied intelligence assets, including satellite technology, should be dedicated to record any atrocities that occur in Darfur so that future prosecutions can take place. We should publicly remind Khartoum that the International Criminal Court has jurisdiction to prosecute war crimes in Darfur and that Sudanese leaders will be held personally accountable for attacks on civilians.”). Senator McCain has also commented upon the adverse consequences that have accompanied the withdrawal of aid under the ASPA and Nethercutt Amendment. “‘We have paid a very heavy price in countries where we have cut off these programs for various reasons,’ Senator John McCain joined in, referring to countries turning toward China for assistance. ‘And these relationships, obviously, are very vital if we’re going to effectively conduct a war on terror.’” Pal, *The Progressive*.

⁸⁴ John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364 (17 October 2006); Coalition for the International Criminal Court Fact Sheet, “Developments on U.S. Bilateral Immunity Agreements (BIAs),” December 2006 available from http://www.iccnw.org/documents/ciccfcs-updatewaivers_11dec06_final.pdf; Internet; accessed 23 April 2007. Two weeks prior to signing this legislation, President Bush issued a presidential waiver of IMET restrictions for 21 nations that were State Parties to the Rome Statute. George W. Bush, “Subject: Waiving Prohibition on United States Military Assistance with Respect to Various Parties to the Rome Statute Establishing the International Criminal Court,” memorandum for the Secretary of State, Washington, DC, 2 October 2006, available from <http://www.whitehouse.gov/news/releases/2006/10/20061002-7.html>; Internet;

accessed 6 May 2007. President Bush essentially overrode this presidential waiver when he signed the 2007 Defense Authorization Act repealing all IMET restrictions that were based on a nation's status as a Rome Statute State Party.

⁸⁵ These nations were Bolivia, Costa Rica, Cyprus, Ecuador, Kenya, Mali, Mexico, Namibia, Niger, Paraguay, Peru, Samoa, South Africa, and Tanzania. George W. Bush, "Subject: Waiving the Prohibition on the use of Fiscal Year 2006 Economic Support Funds with Respect to Various Parties to the Rome Statute Establishing the International Criminal Court," memorandum for the Secretary of State, Washington, DC, 28 November 2006, available from <http://www.whitehouse.gov/news/releases/2006/11/20061128-12.html>; Internet; accessed 6 May 2007. Three countries—Ireland, Brazil, and Venezuela—still faced restrictions on ESF funding under the Nethercutt Amendment. Coalition for the International Criminal Court Fact Sheet, "Developments on U.S. Bilateral Immunity Agreements (BIAs)."

⁸⁶ Coalition for the International Criminal Court Fact Sheet, "Developments on U.S. Bilateral Immunity Agreements (BIAs)."

⁸⁷ At best, the ASPA and Nethercutt Amendment offer an indirect and speculative degree of protection for indicted Americans detained in a country that is a party to the Statute but only to the extent that their coercive effects of holding IMET, FMF, and ESF aid hostage were successful in bringing about a signed bilateral Article 98 agreement. Even in this instance, the fate of an indicted and detained American would ultimately be in the hands of the detaining nation as it decides whether it should honor its obligation to surrender the individual to the ICC or honor its contrary obligation to the U.S. not to surrender the individual under the terms of a bilateral agreement. As either decision will result in a violation of an international agreement and most certainly be met with condemnation, in the end the detaining nation will likely evaluate which course of action best advances its own self interests; an analysis that is not affected by the ASPA or the Nethercutt Amendment. For a lengthy discussion of the issues faced by a country with conflicts between honoring obligations under the Rome Statute and obligations under a bilateral Article 98 agreement, see Meyer, 119-29.

⁸⁸ ASPA, U.S. Code 22, § 7426(c).

⁸⁹ The State Department considers both FMF and IMET to be important instruments used to further U.S. interests. In defining Foreign Military Financing and International Military Education and Training, the State Department notes:

Foreign Military Financing is a critical foreign policy tool for promoting U.S. interests around the world by ensuring that coalition partners and friendly foreign governments are equipped and trained to pursue common security objectives and share burdens in joint missions. By providing grants for the acquisition of U.S. military equipment, services, and training, FMF promotes U.S. national security by contributing to regional and global stability, strengthening military support for democratically-elected governments, fighting the Global War on Terrorism, and containing other transnational threats including trafficking in narcotics, weapons and persons.

The International Military Education and Training Program is an instrument of U.S. national security and foreign policy and a key component of U.S. security assistance that provides training on a grant basis to students from allied and friendly nations. In addition to improving defense capabilities and contributing to the professionalization of foreign militaries, IMET facilitates the development of important relationships that have proven useful in providing U.S. access and influence in a critical sector of society that often plays a pivotal role in supporting or transitioning to democratic governments.

U.S. Department of State, Bureau of Political-Military Affairs, Office of Plans, Policy and Analysis, Security Assistance Team, available from <http://www.state.gov/t/pm/ppa/sat/>; Internet; accessed 26 April 2007.

⁹⁰ Unlike the military aid restrictions in the ASPA which remain in effect over consecutive fiscal years, the restrictions on ESF aid found in the Nethercutt Amendments have only been effective for the fiscal year budget for which the amendment has been enacted. The last fiscal year budget in which these ESF restrictions applied was fiscal year 2006. The Nethercutt Amendment provisions were set to expire at the conclusion of fiscal year 2006. The State Department is currently operating under a continuing resolution for the remainder of fiscal year 2007. It is yet to be determined whether Congress will seek to link ESF aid to Article 98 agreements in its budget submission to the President for fiscal year 2008. Ribando, 3.

⁹¹ Peter Deshazo highlighted the importance of ESF to furthering U.S. interests in Latin America in his testimony before Congress in March 2006:

The unintended effects of the Nethercutt Amendment prohibiting Economic Support Funds (ESF) from benefiting governments that have not signed Article 98 Agreements are similar to those resulting from loss of IMET in terms of their negative impact on U.S. policy interest. ESF is the lifeblood of U.S. funding for structural reform in Latin America, for

encouraging improved governance, strengthening the rule of law, fighting corruption, and promoting sound economic policies, including the enforcement of labor laws. It is a precious resource for U.S. policymakers, one which over the years has been in increasingly short supply.

Peter DeShazo, "The Impact on Latin America of the American Servicemembers' Protection Act," Testimony Before the Western Hemisphere, Peace Corps, and Narcotics Affairs Subcommittee, Committee on Foreign Relations, United States Senate (8 March 2006) available from http://www.csis.org/media/csis/congress/ts060308_deshazo.pdf; Internet; accessed 6 May 2007.

⁹² Taking this approach requires a bit of faith that the ICC will not act arbitrarily or with hidden political agendas with regard to investigations or prosecutions targeting Americans. This risk is worth taking, particularly given the short track record that has been developed by the ICC Chief Prosecutor, Luis Moreno-Ocampo. In the nearly four years the ICC has been officially in operation it has received hundreds of petitions accusing U.S. citizens of committing war crimes. To date, every single referral has been dismissed. Nora Boustany, "A Shift in the Debate on International Court," Washington Post, 7 November 2006, sec. A16.

⁹³ Johnson, 461-62.

⁹⁴ The Bush Administration issued a new National Security Strategy in 2006. All of the strategic objectives listed in the 2002 National Security Strategy are maintained as strategic objectives in the 2006 National Security Strategy. George W. Bush, The National Security Strategy of the United States of America (Washington, DC: The White House, March 2006).

